Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

JOSEPH ORAN RICHARD,

Petitioner,

v.

DAVID R. HINSON, ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION,

Respondent.

Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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30 pp

QUESTION PRESENTED

The Equal Access to Justice Act, 5 U.S.C. § 504, denies attorneys fees, irrespective of the amount of the fees or the unreasonableness of the agency's actions, to a prevailing party whose net worth exceeds $2,000,000. The question presented is whether the government may redress identical claims differently based on the net worth of the parties who file the claim.

PARTIES TO THE PROCEEDING

The parties to the proceeding below were Joseph Oran Richard and David R. Hinson, Administrator of the Federal Aviation Administration.

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Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Joseph Oran Richard petitions for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review the judgment in *Richard v. Hinson*, 70 F.3d 415 (5th Cir. 1995), upholding the FAA's denial of attorneys fees to Mr. Richard.

OPINIONS BELOW

The opinion of the court of appeals is reported at 70 F.3d 415 (5th Cir. 1995) and is reproduced in the Appendix (App.) at A-1. The order of the National Transportation Safety Board denying Mr. Richard's petition for attorneys fees is reproduced in the Appendix at A-7. The NTSB Administrative Law Judge's order denying attorneys fees is reproduced in the Appendix at A-10.

JURISDICTION

The Opinion (App. A-1) of the court of appeals was entered on December 12, 1995. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

The Equal Access to Justice Act, 5 U.S.C. § 504, provides in pertinent part:

> (a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. . . .
>
> . . . .
>
> (b)(1) For the purposes of this section--
>
> . . . .
>
> (B) "party" means a party . . . who is . . . an

> individual whose net worth did not exceed $2,000,000 at the time the adversary adjudication was initiated . . . .

STATEMENT OF THE CASE

Joseph Oran Richard is the sole owner and operator of Industrial Helicopters of Lafayette, Louisiana. Industrial Helicopters provides helicopter support in Texas and Louisiana for oil and gas development, herbicide right of way applications, and cattle herding and predator control; it has provided helicopter service to government agencies such as the U.S. Fish and Game Service and Louisiana Wildlife & Fisheries. For 25 years Mr. Richard has held an airman's certificate from the Federal Aviation Administration. During that time he has flown some 14,000 hours.

In May 1994, the Assistant Chief Counsel for the Southwest Region of the Federal Aviation Administration issued an emergency order, revoking Mr. Richard's airman's certificate. The FAA alleged that Mr. Richard had twice violated Federal Aviation Regulations by flying his helicopter in the vicinity of recreational fisherman in a remote area of Louisiana. The FAA alleged that Mr. Richard did not possess the qualifications required to hold the airman's certificate. The order was effective as of the day it was issued.

Mr. Richard sought review of the emergency revocation before the National Transportation Safety Board (NTSB). Following a hearing, the Administrative Law Judge reversed the emergency revocation on the grounds that there was insufficient evidence of the second alleged incident. The ALJ concluded that the first alleged incident constituted a regulatory violation only and that the appropriate sanction was a 30 day suspension. Since Mr. Richard's license had already been suspended for more than 30

days under the emergency order, the Administrative Law Judges's order had the effect of returning Mr. Richard's airman's certificate.

Both the FAA and Mr. Richard sought review of the ALJ's decision before the NTSB. The NTSB granted Mr. Richard's appeal in full and reversed the 30 day suspension. It restored his airman's certificate without sanction, suspension or revocation. The NTSB agreed with the ALJ that there was "insufficient evidence of careless or reckless operation" and, therefore, "revocation was wholly unwarranted."

In August 1994, Mr. Richard filed an application pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504, seeking attorneys fees of more than $60,000. Without reaching the question of whether the FAA had been "substantially justified" (5 U.S.C. § 504(a)(1)), the FAA denied the application because Mr. Richard acknowledged that his net worth exceeded $2,000,000. App. A-7. The NTSB affirmed the dismissal of his application for fees on the same grounds. App. A-10.

The Fifth Circuit Court of Appeals affirmed the judgment. The court of appeals held that, because EAJA classified claimants by wealth, which is not a suspect class, and EAJA did not violate the right of access to the courts, the court would apply rational basis. The court found that EAJA "eliminate[s] for the average person the financial disincentive to challenge unreasonable government actions" (App. A-5). "The net worth provision specifies the outer financial limits of the individuals who [Congress] determined may forego challenging the government because of the expense involved" (App. A-5, A-6).

REASONS FOR GRANTING THE WRIT

This case presents a straightforward and substantial question under the Equal Protection Component of the Fifth Amendment Due Process Clause: May the government redress identical claims differently based on the net worth of the parties who file the claim? The Fifth Amendment, like the Fourteenth,[1] requires that "all persons similarly circumstanced shall be treated alike." *Johnson v. Robison*, 415 U.S. 361, 374-75 (1974) (citation omitted). While we cannot demand "mathematical nicety" of Congress (*Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911)), even its economic and social legislation "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." *Johnson*, 415 U.S. at 374. Congress has failed to do so here.

A. The Equal Access to Justice Act Treats Identical Claims Differently

The Equal Access to Justice Act, 5 U.S.C. § 504, provides that in adversary adjudications, the government "shall award . . . fees and other expenses" to prevailing parties, except where the agency's position was "substantially justified." 5 U.S.C. § 504(a)(1).[2] It is not sufficient that the government does not

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[1] The Court's "'approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.'" *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2108 (1995) (*quoting Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975)).

[2] EAJA created two cost-shifting statutes, one that applied in agency adjudications, 5 U.S.C. § 504; another in federal court proceedings, 28 U.S.C. § 2412(d). These are parallel proceedings and have similar requirements. H.

prevail; rather the government's position must have been unreasonable. *Pierce v. Underwood*, 487 U.S. 552, 565-66 (1988). The agency's failure to make an award must be supported by "substantial evidence." 5 U.S.C. § 504(c)(2).

Congress excluded from EAJA's coverage individual parties whose "net worth" exceeds $2,000,000 at the time the action began. 5 U.S.C. § 504(b)(1)(B). The exclusion is complete; it applies irrespective of the unreasonableness of the government's actions or the amount of fees and other expenses incurred by the prevailing party. Even though a party has demonstrated that the agency's action was not substantially justified, his qualification for attorneys fees under EAJA turns exclusively on his net worth. The courts have thus denied awards to co-parties who are separately represented and ineligible because of their net worth, *see American Ass'n of Retired Persons v. EEOC*, 873 F.2d 402, 405-07 (D.C. Cir. 1989); *State ex rel. Guste v. Lee*, 853 F.2d 1219, 1223-25 (5th Cir. 1988), and apportioned fees where ineligible co-parties were represented by common counsel. *See Sierra Club v. U.S. Army Corps of Engineers*, 776 F.2d 383, 393-94 (2d Cir. 1985), *cert. denied*, 475 U.S. 1084 (1986); *Citizens Council of Delaware County v. Brinegar*, 741 F.2d 584, 597-98 (3d Cir. 1984).

In this case, the FAA denied Mr. Richard's attorneys fees solely on the grounds of his net worth. As explained in the following section, EAJA's classification does not further any purpose for the Act and is quite contrary to its stated purposes.

B. EAJA's Net Worth Classification Is Not Rationally-Related to Congress' Interest in Compensating Claimants, Deterring

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Rep. No. 1418, 96th Cong., 2d Sess. 17 (1980).

Government Misconduct, or Encouraging Meritorious Suits

Congress identified three purposes for EAJA: First, to promote more complete redress for injuries suffered by unreasonable government actions; second, to deter government wrongdoing; and third, to give private parties the financial incentive to challenge government action. *See Commissioner v. Jean*, 496 U.S. 154, 163-65 & nn. 11 & 14 (1990); *Spencer v. NLRB*, 712 F.2d 539, 549-50 (D.C. Cir. 1983), *cert. denied*, 466 U.S. 936 (1984). *See also* Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorneys' Fees for Unreasonable Government Conduct (Part One)*, 55 La. L. Rev. 217, 225-26 (1994); Harold J. Krent, *Fee Shifting Under Equal Access to Justice Act--A Qualified Success*, 11 Yale L. & Pol'y Rev. 458, 458 (1993). None of these purposes is furthered by EAJA's net worth classification and exclusion.

1. "EAJA serves 'a salutary function in creating the appearance of fairness' by providing more complete compensation to those who have suffered a breach of the public trust through the arbitrary and unreasonable use of government power." Sisk, *supra*, 55 La. L. Rev. at 226 (*quoting* Krent, *supra*, 11 Yale L. & Pol'y Rev. at 477). As a partial waiver of sovereign immunity and a statutory exception to the American rule that parties bear their own costs of litigation (*Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 415 (1978)), EAJA permits additional compensation to prevailing parties.

Congress' purpose of providing compensation is not served by denying compensation on grounds wholly unrelated to the merits of the litigation. A party's net worth is not rationally related to whether or not a party has demonstrated the unreasonableness of the government's action. Irrespective of whether classifications

based on wealth (or the lack thereof) are entitled to heightened or rational basis scrutiny, *see Adarand*, 115 S. Ct. at 2105; *Dandridge v. Williams*, 397 U.S. 471, 484-85 (1970), Congress could not make one's wealth a condition of seeking redress. It would, for instance, violate the fundamental fairness embodied in the Due Process Clause for Congress to waive its sovereign immunity under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-80, for some persons and not for others based exclusively on their net worth. It would have been irrational for Congress, for example, in offering reparations to Japanese-Americans interned during World War II (Pub. L. No. 100-383, 102 Stat. 903) to have decided that some Japanese-Americans should be compensated and others not, the deciding factor being how much money they possessed.

We do not challenge the power of Congress to enact social and economic legislation that provides government largess based on need and ties government aid to the putative recipients' income or wealth. *See U.S. Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980); *Jefferson v. Hackney*, 406 U.S. 535 (1972). But as a matter of *compensating* the victims of government overreaching, it is irrational for Congress to compensate identically situated parties differently. Having determined to waive sovereign immunity for attorneys fees in cases where an agency's actions are unreasonable, Congress cannot determine that some claimants' redress shall be greater than others based on factors wholly unrelated to the claim and the underlying merits of the action.

2. Requiring agencies to pay claims under EAJA also deters future agency wrongdoing. EAJA is an "anti-bully" law (*Battles Farms Co. v. Pierce*, 806 F.2d 1098, 1101 (D.C. Cir. 1986), *vacated*, 487 U.S. 1229 (1988)) that recognizes the public purpose served by those who challenge government overreaching. As the House of Representatives stated,

> the Government with its greater resources and

> expertise can in effect coerce compliance with its position. Where compliance is coerced, precedent may be established on the basis of an uncontested order rather than the thoughtful presentation and consideration of opposing views. . . . Where parties are serving a public purpose, it is unfair to ask them to finance through their tax dollars unreasonable Government action and also bear the costs of vindicating their rights.

H.R. Rep. No. 1418, *supra*, at 10. The Senate Report similarly noted that "[w]hen there is an opportunity to recover costs, a party does not have to choose between acquiescing to an unreasonable Government order, or prevailing to his financial detriment." S. Rep. No. 253, 96th Cong., 1st Sess. 7 (1979).

The Government's ability to coerce compliance depends on two factors. First, its enormously greater resources; second, the costs of litigation relative to the rights being vindicated. The first factor is simply a truism: In any case, the government's resources dwarf those of *any* individual citizen. The government will always have the advantage; it will always find itself with the resources to defend its positions, no matter how unreasonable. The second factor is more difficult for private parties to asses *ex ante*: What will be the costs to vindicate my rights? A party has no way of knowing in advance to what extent an agency will force the party to litigate.

As this case demonstrates, rights that are important to individuals may be very costly to litigate. Mr. Richard litigated this case to a successful conclusion not only because he valued his reputation and clear flying record, but because there were significant future consequences if he had suffered FAA suspension or revocation of his airman's certificate. Mr. Richard's business depended on his certificate. But even in defense of his airman's

certificate, Mr. Richard's resources were not inexhaustible. He had no means of determining at the outset the expenses he would have to bear to overcome the FAA's wholly unreasonable actions.

If one purpose of EAJA is to deter future agency wrongdoing, that purpose is fully served by compensating wealthier claimants as well as parties with fewer personal resources. In fact, to permit agencies to avoid compensating some prevailing parties because of a factor irrelevant to the merits (net worth) would *disserve* the purpose of deterrence. For regulatory agencies (such as the FAA), which are more likely to deal with individuals and corporations ineligible under EAJA, EAJA's exclusion serves no disciplining mechanism whatsoever. In this case, the NTSB concluded that the FAA's summary actions were "wholly unwarranted"; yet the apparent result is that the FAA inflicted more than $60,000 in attorneys fees on Mr. Richard and, in the end, returned Mr. Richard's airman's certificate and suffered no penalty whatsoever. And the reason the FAA gets away with this is because, fortuitously for the FAA, Mr. Richard has a substantial net worth. EAJA's classification is untenable.

3. Finally, EAJA gives parties a financial incentive to bring suits against the government. The court of appeals focused its opinion on this third point and ignored the other purposes of EAJA; here it made its error. It is quite true that Congress was especially concerned with "those individuals for whom costs may be a deterrent," in particular, the "average person" (*Jean*, 496 U.S. at 193) and "small businesses" (H.R. Rep. No. 1418, *supra*, at 10). While Mr. Richard may not be the "average person" contemplated by Congress, EAJA offers him no less of a financial incentive to bring suit against the government. And in cases where the fees are likely to be significant, the promise of redress may be an important consideration in the decision to challenge the agency's action.

In sum, it would not be irrational for Congress to include wealthier parties, even in light of Congress' concern for small businesses and individuals with fewer resources. On the other hand, in light of EAJA's other stated purposes--deterring future agency wrongdoing and compensating parties for past agency wrongdoing--it is irrational for Congress to make redress of attorneys fees turn on the question of one's net worth. EAJA violates the Due Process Clause not because it fails to encourage persons such as Mr. Richard to bring suit, but because once suit has been successfully brought, it promises different compensation for identical claims.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 11, 1996

APPENDIX A

Joseph Oran, RICHARD, Petitioner,

v.

David R. Hinson, Administrator,
FAA, Respondent.

No. 95-60225

Summary Calendar.

United States Court of Appeals,

FIFTH CIRCUIT.

Dec. 12, 1995.

Petitioner sought recovery of attorney fees and expenses under Equal Access to Justice Act (EAJA) after the National Transportation Safety Board (NTSB) dismissed charges and reinstated petitioner's airman certificate. The NTSB denied application for fees and expenses on basis of petitioner's net worth in excess of $2 million. Appeal was taken. The Court of Appeals, Duhe', Circuit Judge held that: (1) provision of EAJA denying reimbursement to those with net worth of over $2 million classified according to wealth, which was not suspect criterion and which did not implicate fundamental right and, thus, provision was not subject to strict scrutiny, and (2) net worth provision had rational basis and furthered legitimate government interest in removing economic disincentive to challenge unjustified government actions and, thus, did not violate petititoner's equal protection rights.

AFFIRMED.

Appeal from the final order of The National Transportation Safety Board.

Before HIGGINBOTHAM, DUHE' and EMILIO M. GARZA, Circuit Judges.

DUHE', Circuit Judge:

Petitioner argues that a provision of the Equal Access to Justice Act violates the equal protection rights of individuals with a net worth of over $2 million. He asks that we declare the provision unconstitutional and award him fees and expenses. We decline.

FACTS

A Federal Aviation Administration Administrator ordered the emergency revocation of petitioner's airman certificate. Eventually, all charges were dismissed by the National Transportation Safety Board (NTSB) and petitioner's certificate was reinstated.Petitioner applied for attorney's fees and expenses pursuant to the Equal Access to Justice Act (EAJA).[1] Under the EAJA, individuals with a net worth less than $2 million are entitled to reimbursement of fees and expenses if the government agency cannot show substantial justification for its position against that individual. 5 U.S.C. §§ 504(a)(1), 504(b)(1)(B) (Supp.1995). Petitioner's application for fees and expenses was denied because his net

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[1] 5 U.S.C. § 504 (Supp. 1995). Other portions of the EAJA not implicated here are codified at 28 U.S.C. § 2412 (1994) and 15 U.S.C. § 634b (Supp. 1995).

worth exceeds $2 million.[2]

DISCUSSION

We have jurisdiction under 49 U.S.C. § 1153 (1995) and 5 U.S.C. § 504 (c)(2) (Supp. 1995), which grant federal courts of appeals jurisdiction over appeals from final orders of the NTSB. We review the constitutionality of the EAJA net worth provision *de novo. United States v. Guajardo,* 950 F.2d 203 (5th Cir.1991), *cert. denied,* 503 U.S. 1009, 112 S.Ct. 1773, 118 L.Ed.2d 432 (1992). *See also Stewart v. Parish of Jefferson,* 951 F.2d 681, 683 (5th Cir.1992).

[1] Although petitioner asserts that his Fourteenth Amendment equal protection rights were violated, his claims actually arise under the Fifth Amendment which protects parties from unjustifiable discriminatory applications of law. *Adarand Constructors, Inc. v. Pena,* ____ U.S. ____, ____ ____, 115 S.Ct. 2097, 2107-08, 132 L.Ed.2d 158 (1995); *Torres v. Shalala,* 48 F.3d 887 (5th Cir.1995) The Fourteenth Amendment protects against actions by states but here, the federal government is the subject of petitioner's complaints making the Fourteenth Amendment inapplicable. We employ the same test to evaluate alleged equal protection violations under the Fifth Amendment as we do under the Fourteenth Amendment. *Adarand,* ____ U.S. at ____, 115 S.Ct. at 2107; *Torres,* 48 F.3d at 890-91.

[2] In evaluating an equal protection claim, we must

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[2] The NTSB made no finding regarding the substantial justification requirement. Nevertheless, petitioner argues that the FAA had no justification for revoking the certificate. *Because* we uphold the net worth provision and find it dispositive, we do not address this argument.

first determine the proper standard under which to review the classification and then analyze the purpose of the legislation to determine whether it satisfies the standard. *United States R.R. Retirement Bd. v. Fritz,* 449 U.S. 166, 174, 101 S.Ct. 453, 459, 66 L.Ed.2d 368 (1980); *Chrysler Corp. v. Texas Motor Vehicle Comm'n.* 755 F.2d 1192 (5th Cir.1985). Strict scrutiny is required if the legislative classification operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution. *San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). Otherwise, the legislative classification need only bear a rational relation to a legitimate governmental purpose, *Torres,* 48 F.3d at 891.

[3] The EAJA provision classifies according to wealth which alone is not a suspect criterion. *San Antonio Indep. Sch. Dist.,* 411 U.S. at 28, 93 S.Ct. at 1294; *Chrysler Corp.,* 755 F.2d at 1203. Therefore, we review the provision under strict scrutiny only if it impinges on a fundamental right. A fundamental right for equal protection purposes is one that is explicitly or implicitly protected by the Constitution. *San Antonio Indep. Sch. Dist.,* 411 U.S. at 29, 93 S.Ct. at 1294-95.

[4] Petitioner argues that the net worth provision violates one of his fundamental rights, his First Amendment right of access to courts. In support, petitioner relies on *Douglas v. California,* 372 U.S. 353, 83 S.Ct. 814. 9 L.Ed.2d 811 (1963) and *Griffin v. Illinois,* 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956) where indigent criminal defendants could not be heard in court because they could not pay filing and transcript fees. In those cases, the Supreme Court recognized a duty of government to equalize access to courts

by assisting the poor. Those who are not poor have no need for similar equalization. In the absence of legislation providing otherwise, litigants must pay their own attorney's fees. *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978).

[5,6] Petitioner was not denied access to court; he is merely required to pay for that access. The actual "right" petitioner seeks to enforce is reimbursement of attorney's fees and expenses for which there is no constitutional basis. Without a constitutional basis, the right is not considered fundamental, and the classification does not require strict scrutiny. We therefore evaluate the constitutionality of the classifying provision under the rational basis standard. To be constitutionally valid, the classification need not be perfect or mathematically precise. *Dandridge v. Williams,* 397 U.S.471, 485, 90 S.Ct. 1153, 1161-62, 25 L.Ed.2d 491 (1970). Under the rational basis test, disparate treatment of similarly situated groups is not unlawful if a rationl purpose underlies the disparate treatment and Congress has not achieved that purpose in a patently arbitrary or irrational way. *United States R.R. Retirement Bd.* 449 U.S. at 177, 101 S.Ct. at 460-61; *Belarmino v. Derwinski,* 931 F.2d 1543 (Fed.Cir.1991). Petitioner questions only the legislature's purpose.

[7] The purpose of the EAJA is to eliminate for the average person the financial disincentive to challenge unreasonable government actions. *Commissioner, INS v. Jean,* 496 U.S. 154, 163, 110 S.Ct. 2316, 2321, 110 L.Ed.2d 134 (1990); 5 U.S.C. § 504 historical and statutory notes. Rather than restricting access, the EAJA broadens access to courts. The net worth provision specifies the outer financial limits of the individuals who the legislature determined

may forego challenging the government because of the expense involved. This purpose is legitimate.

Petitioner, without authoritative support, argues that the purpose of the net worth provision is to conserve government financial resources, a purpose that is not legitimate. We are not persuaded that conservation of resources is the purpose.

The net worth provision of the EAJA does not violate petitioner's equal protection guarantees. The provision has a rational basis and furthers a legitimate government interest, the removal of an economic disincentive to challenge unjustified actions of government agencies.

AFFIRMED.

SERVED: April 4, 1995

NTSB Order No. EA-4336

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the
NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 21st day of March, 1995

JOSEPH ORAN RICHARD,	)	
Applicant,	)	
v.	)	
	)	DOCKET
	)	216-EAJA-SE-13657
DAVID R. HINSON, Administrator, Federal Aviation Administration,	)	
Respondent.	)	

OPINION AND ORDER

Applicant has appealed from an order served by Administrative Law Judge William R. Mullins on October 4, 1994, dismissing applicant's application for $61,357.51 in attorney fees and expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. 504, because of applicant's failure to meet the eligibility requirements of that Act pertaining to net worth.[1] As discussed below, applicant's appeal is denied and the order of dismissal is affirmed.

Applicant prevailed over the Administrator in an enforcement action decided by the full Board. *Administrator v. Richard,* NTSB Order No. EA-4223 (1994).[2] He subsequently applied for attorney fees and expenses pursuant to the EAJA, admitting in his EAJA application that he has a net worth in excess of two million dollars. Applicant recognizes that both the EAJA and our implementing regulations limit recovery under that Act to individuals with a net worth of no more than two million dollars. [3] He argues, however, that this restriction is unconstitutional and denies

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[1] A copy of the initial decision is attached.

[2] In that enforcement action the Administrator sought to revoke applicant's pilot certificate on an emergency basis, citing two incidents of allegedly improper low flight, in violation of 14 C.F.R. 91.119(a) and (d), and 91.13(a). The law judge affirmed violations of 14 C.F.R. 91.119 (d) and 91.13 (a) with regard to one incident, but found no violations with regard to the other incident. In Order No. EA-4223 we granted applicant's appeal and denied the Administrator's appeal from the law judge's initial decision, resulting in a complete dismissal of the Administrator's emergency order.

[3] The EAJA provides for recovery by a "prevailing party." 5 U.S.C. 504 (a) (1). However, 5 U.S.C. 504 (b) (1) states:

> For the purposes of this section —
> * * *

him equal protection of the law.

We have no authority to ignore the terms of the EAJA, or to declare that statute unconstitutional. The EAJA's net worth restriction is a threshold requirement which clearly prohibits applicant from recovering attorney fees and expenses under that Act. Accordingly, we affirm the law judge's dismissal of the application on that basis. We express no view in this decision as to whether the Administrator's position in this case was substantially justified, or as to whether applicant's request for fees and expenses was otherwise proper under the EAJA.

ACCORDINGLY, IT IS ORDERED THAT:

1. Applicant's appeal is denied; and

2. The order dismissing applicant's EAJA application is affirmed.

HALL, Chairman, FRANCIS, Vice Chairman, and HAMMERSCHMIDT, Member of the Board, concurred in the above opinion and order.

---

footnote 3 continued.

> (B) "party" means a party, as defined in section 551 (3) of this title, who is (i) an individual whose net worth did not exceed $2,000,000 at the time the adversary adjudication was initiated, . . .
> * * *

Similarly, our regulations implementing the EAJA specify that an eligible applicant is "[a]n individual with a net worth of not more than $2 million." 49 C.F.R. 826.4 (b) (1).

APPENDIX C

UNITED STATES OF AMERICA

NATIONAL TRANSPORTATION SAFETY BOARD

OFFICE OF ADMINISTRATIVE LAW JUDGES

**********		
	*	
	*	SERVED
	*	OCTOBER 4, 1994
JOSEPH ORAN RICHARD,	*	
	*	
Applicant,	*	
	*	
vs.	*	Docket
	*	No. 216-EAJA-SE-13657
ADMINISTRATOR,	*	
Federal Aviation	*	
Administration,	*	
Respondent,	*	
	*	
**********		

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ORDER DISMISSING APPLICATON
FOR ATTORNEY FEES AND EXPENSES

The Applicant has filed an application for fees pursuant to the Equal Access to Justice Act, 5 U.S.C., Sec. 504, and the National Transportation Safety Board's implementing Rule 49 CFR, Sec. 826.

The Applicant alleges in his Application that his net worth exceeds $2 Million which exceeds the eligibility requirements of NTSB Rule 49 CFR, Sec. 826 (b) (1). The Applicant states in his application that the provisions of the Act limiting eligibility to Applicant with $2 Million or less in net worth is unconstitutional.

The Administrator has moved to dismiss the Application because of Applicant's failure to meet the net worth requirements of the Act. This Motion was filed on September 8, 1994, and has not been responded to by the Applicant.

Because the Applicant does not meet the eligibility requirements of the Act and has admitted this in his application, the Administrator's Motion to Dismiss is hereby SUSTAINED and the Application for Attorney's Fees and Ex-

penses is hereby DISMISSED.

ENTERED AND SERVED this 4th day of October, 1994, at Arlington, Texas.

/s/ William R. Mullins

Hon. William R. Mullins
Administrative Law Judge

Supreme Court, U.S.
FILED
MAY 13 1996
CLERK

No. 95-1469

In the Supreme Court of the United States

OCTOBER TERM, 1995

JOSEPH ORAN RICHARD, PETITIONER

v.

DAVID R. HINSON, ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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10 pp

QUESTION PRESENTED

Whether petitioner's right to equal protection is violated by the Equal Access to Justice Act provision precluding individuals with a net worth of more than $2 million from recovering attorney fees from the government.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is reported at 70 F.3d 415. The orders of the National Transportation Safety Board (Pet. App. A7-A9) and the Administrative Law Judge (Pet. App. A10-A12) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 1995. The petition for a writ of certiorari was filed on March 11, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a helicopter pilot who owns Industrial Helicopters of Lafayette, Louisiana. Pet. 3. The underlying administrative proceeding arose when the Administrator of the Federal Aviation Administration issued an emergency order revoking petitioner's airman's certificate. Pet. App. A2. Petitioner successfully appealed the revocation, and then filed an application with the National Transportation Safety Board (NTSB) for fees and expenses under the Equal Access to Justice Act, 5 U.S.C. 504 (EAJA). Pet. App. A2. In the application, petitioner acknowledged that his net worth exceeded $2 million, but contended that EAJA's net-worth limitation—which precludes individuals with a net worth of more than $2 million from recovering EAJA fees—violated his equal protection rights. *Id.* at A8-A9. The Administrative Law Judge dismissed petitioner's application because petitioner admittedly did not meet EAJA's eligibility requirements (*id.* at A12), and the NTSB affirmed the dismissal, noting that it did not have the authority to pass on EAJA's constitutionality (*id.* at A9). Petitioner filed a petition for review in the court of appeals. *Id.* at A2.

2. The court of appeals held that EAJA's net-worth limitation does not violate petitioner's equal protection rights and therefore affirmed the NTSB's dismissal of the fee application. Pet. App. A6. Applying the rational basis standard of review, the court concluded that EAJA's net-worth limitation withstands constitutional scrutiny because it is rationally related to the congressional purpose of reducing the financial deterrent typically faced by a person wishing to contest unreasonable government

action. The limitation reasonably identifies "the outer financial limits of the individuals who the legislature determined may forego challenging the government because of the expense involved." *Id.* at A5-A6.

ARGUMENT

Petitioner asserts that EAJA's net-worth limitation violates his Fifth Amendment right to equal protection. His petition does not challenge the applicability of the rational basis test to the constitutional inquiry, nor does it criticize the court of appeals' articulation of that test. Instead, petitioner argues that the net-worth limitation is not rationally related to Congress's purpose in enacting EAJA.

The rational basis test is satisfied if the legislative classification "bear[s] a rational relation to a legitimate governmental purpose." *Regan* v. *Taxation With Representation*, 461 U.S. 540, 547 (1983). As this Court has explained:

> If the classification has some reasonable basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality. The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

Dandridge v. *Williams*, 397 U.S. 471, 485 (1970) (internal citations and quotations omitted).

EAJA's net-worth limitation easily meets this standard. In passing EAJA, Congress's "specific pur-

pose" was "to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions." *Commissioner, INS* v. *Jean*, 496 U.S. 154, 163 (1990). Congress recognized that "certain individuals * * * may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings." The purpose of the Act was "to diminish the deterrent effect of seeking review of, or defending against, [such] governmental action by providing in specified situations an award of attorney fees." Equal Access to Justice Act, Pub. L. No. 96-481, § 202, 94 Stat. 2325 (Congressional Findings and Purpose Note following 5 U.S.C. 504). Accord, H.R. Rep. No. 1418, 96th Cong., 2d Sess. 10 (1980) (EAJA "focuses primarily on those individuals for whom cost may be a deterrent to vindicating their rights").[1]

---

[1] As Senator Domenici, one of the primary sponsors of the bill that became EAJA, explained during the legislative hearings (*Award of Attorneys' Fees Against the Federal Government: Hearings on S. 265 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 16 (1980)):

> The basic problem this bill seeks to overcome is the inability of many Americans to combat the vast resources of the Government in administrative adjudication. In the usual case, a party has to weigh the high cost of litigation or agency proceedings against the value of the rights to be asserted. Individuals and small businesses are in far too many cases forced to knuckle under to regulations even though they have a direct and substantial impact because they cannot afford the adjudication process. * * * The purpose of the bill is to redress the balance between the

The net-worth limitation reflects Congress's rational conclusion that the financial burden is unlikely to be a significant deterrent for individuals, like petitioner, with a net worth exceeding $2 million. These individuals are treated differently from the average litigant because, in view of their wealth, there is not a comparable need to relieve them from the deterrent effect of litigation costs.[2]

Petitioner argues that the net-worth limitation cannot survive rational basis scrutiny. He asserts (Pet. 8) that "Congress cannot determine that some claimants' redress shall be greater than others based on factors wholly unrelated to the claim and the underlying merits of the action." But the purpose of EAJA is not simply to provide additional compensation to parties prevailing against the government; rather, "[t]he clearly stated objective of the EAJA is to eliminate financial disincentives for those who would defend against unjustified governmental action and thereby to deter the unreasonable exercise of

---

Government acting in its discretionary capacity and the individual.

[2] Congress initially set the financial cut-off point for individuals at a net worth of $1 million; it raised that point to $2 million when EAJA was re-enacted. EAJA Amendments, Pub. L. No. 99-80, § 1(c)(1), 99 Stat. 183. Petitioner does not challenge the $2 million cut-off point Congress selected. Instead, he argues simply that "in cases where the fees are likely to be significant, the promise of redress may be an important consideration in [anyone's] decision to challenge the agency's action." Pet. 10. That conclusory assertion is not sufficient to demonstrate that Congress was irrational in deciding that, for individuals with a net worth of more than $2 million, the costs of litigation are unlikely to be so significant and widespread a deterrent as to warrant remedial legislation. See *Dandridge* v. *Williams*, *supra*.

Government authority." *Ardestani* v. *INS*, 502 U.S. 129, 138 (1991). In light of that purpose, a distinction based on the net worth of the party is entirely rational. Cf. 28 U.S.C. 1915 (providing for in forma pauperis proceedings in federal courts).

Contrary to petitioner's suggestion (Pet. 8), the EAJA net-worth limitation is not analogous to a net-worth limitation on persons entitled to recover under the Federal Tort Claims Act, or to a similar restriction on statutory reparations to World War II internees. EAJA neither limits petitioner's access to the courts, nor does it deny him a cause of action that is available to others. Nothing in EAJA prohibits petitioner from defending against or challenging government action in agency proceedings or the courts. Petitioner's only complaint is that Congress has not subsidized the litigation of individuals like him who already have the resources to gain meaningful access to the courts.

Petitioner asserts that EAJA's net-worth limitation is not rationally related to the statute's purpose of deterring unreasonable government action, since that purpose would be "fully served by compensating wealthier claimants as well as parties with fewer personal resources" (Pet. 10). It is not necessary, however, for a statutory provision to be rationally related to all of the statute's purposes. It is enough that the net-worth limitation is, as we have shown, rationally related to the purpose of eliminating substantial financial disincentives to suit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Respondent.

Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

PETITIONER'S BRIEF IN REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION

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In our petition, we demonstrated that the Equal Access to Justice Act, 5 U.S.C. § 504, has three stated purposes: (1) to redress injuries -- including attorneys fees -- inflicted by past government wrongdoing, (2) to deter future government

wrongdoing, and (3) to provide private parties additional financial incentive to challenge the government's wrongful actions. We demonstrated that EAJA's net-income limitation discriminates among identically-situated claimants, promising less compensation to persons with a net worth of more than $2,000,000, irrespective of the egregiousness of the government's actions or the amount of the attorneys fees incurred. As a result, EAJA's discriminatory provision utterly disserves EAJA's announced purposes. The Government's Brief in Opposition misconceives the Petitioner's cause for complaint and fails to answer these points.

1. In our petition, we suggested that it would be irrational for Congress to make wealth a condition of obtaining redress of grievances against the government. It would violate the equal protection component of the Due Process Clause for Congress to make FTCA awards turn on a claimant's wealth. Just as "[w]ealth . . . is not germane to one's ability to participate intelligently in the electoral process," (*Harper v. Virginia Board of Elections*, 383 U.S. 663, 668 (1966)), wealth is irrelevant -- "a capricious or irrelevant factor" (*ibid.*) -- to one's right to claim redress from the government.

The Government answers that "EAJA neither limits petitioner's access to the courts, nor does it deny him a cause of action that is available to others" (Br. in Opp. 6). The first part of the Government's assertion is irrelevant; the second part is simply not true. The first statement regarding access to the courts, is irrelevant because at no point in our petition did we assert that Mr. Richard had been denied access to the courts or to any other

administrative proceeding. What we did argue -- and here is where the Government is simply wrong -- is that Mr. Richard has been "den[ied] a cause of action that is available to others." Indeed, Mr. Richard has been denied a cause of action under EAJA, and the sole basis for denying Mr. Richard a cause of action is his wealth. This is not a matter of "mathematical nicety" or "some inequality" (*Dandridge v. Williams*, 397 U.S. 471, 485 (1970)), but a pure Government preference based on reasons wholly unrelated to the merits of Mr. Richard's claim. "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense" (*Romer v. Evans*, No. 94-1039, slip op. at 23 (U.S. May 20, 1996)).

2. The Government does not deny in any respect that EAJA's net worth limitation disserves the purposes of deterring government wrong-doing. It passes the point by asserting that EAJA does not have to be "rationally related to all of the statues's purposes" (Br. in Opp. 6). The Government's suggest is not well taken. The essence of rational basis review is that "the classification has *some* reasonable basis" (*Dandridge*, 397 U.S. at 485 (emphasis added)). Under the Government's formulation, Congress might have decided to award attorneys fees to every tenth claimant. Such a law admittedly would give potential parties some financial incentive to file suit -- and, thus, in the Government's view, have some reasonable basis -- but it surely is not a rational scheme in light of EAJA's other purposes.

Congress could not have made it clearer that "[w]here parties are serving a public purpose, it is unfair to ask them to finance through their tax dollars unreasonable Government action and also bear the costs of vindicating their rights." H.R. Rep. No. 1418, 96th Cong., 2d Sess. 10 (1980). Yet Congress did precisely that when it excluded parties serving a public purpose such as Mr. Richard. As we pointed out in our petition, the Federal Aviation Administration behaved, as the NTSB found, in a "wholly unreasonable" fashion when it summarily revoked Mr. Richard's license. For anyone else besides a person situated as Mr. Richard, the FAA would suffer the indignity of having to pay attorneys fees. Instead, the FAA is off the hook because of the fortuity of Mr. Richard's financial status. EAJA's disciplining mechanism has broken down here and failed to protect persons such as Mr. Richard.

3. Finally, the government asserts that persons such as Mr. Richard are "treated differently from the average litigant because, in view of their wealth, there is not a comparable need to relieve them from the deterrent effect of litigation costs" (Br. in Opp. 5). The Government's assertion comes without any basis in fact or logic. EAJA's limitation applies irrespective of the nature of the agency's actions or the actual costs of vindicating a litigant's rights. Mr. Richard's resources were not unlimited and no match for those of an agency determined to wage a war of attrition to cover its wholly unjustifiable actions.

The question presented is substantial. While we recognize the burden Mr. Richard bears in this petition, the fact his burden

is great does not render EAJA's gross discrimination any more rational.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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